

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
(Hilo, Hawaii)

HILO MEDICAL INVESTORS LIMITED d/b/a  
HALE ANUENUE RESTORATIVE CARE CENTER 1/

Employer

and

DIANNE M. ADKINS, An Individual

Petitioner

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,  
LOCAL 142. AFL-CIO 2/

Union

37-RD-371

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/
3. The labor organization involved claims to represent the employees of the Employer. 4/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 5/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 6/

All full-time and regular part-time employees employed by the Employer at its Hale Anuenue facility at 1333 Waianuenue Avenue, Hilo, Hawaii in the following classifications: certified nursing assistants (CNA), laundry aides, housekeeping aides, laundry/house/security aides, ward clerks, transportation aides, central supply and receiving clerk (CSR), maintenance assistants, activities aides, cooks, dietary aides, but excluding all other employees, professionals, technicals and confidential employees, LPN's, RN's, business clerical employees, supervisors and guards as defined in the Act.

**DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which

(OVER)

commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, AFL-CIO.

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Subregion 37 Office, 300 Ala Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu, Hawaii 96850, on or before November 26, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by December 3, 2003

Dated November 19, 2003

at San Francisco, California

/s/ Robert H. Miller

- 1/ The name of the Employer is in accord with the stipulation of the parties.
- 2/ The name of the Union is in accord with the stipulation of the parties.
- 3/ The parties stipulated, and I find, that the Employer is a Georgia limited partnership engaged in the operation of a skilled nursing care facility. The record reflects that this facility is located at Hilo, Hawaii. The parties further stipulated, and I find, that during the 12-month period ending July 31, 2003, the Employer derived gross revenues in excess of \$250,000, and purchased and received goods valued in excess of \$5,000 directly from points located outside the State of Hawaii. Based on the parties' stipulation to such facts and the record evidence, I conclude that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter.
- 4/ The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.
- 5/ The parties stipulated, and I find, that there is no collective bargaining agreement covering any of the employees in the unit sought in the petition herein.
- 6/ The only issue presented is whether the petition must be dismissed because Petitioner Dianne M. Adkins is a statutory supervisor. The Union contends that she is a statutory supervisor and the Employer takes the opposite position. As discussed below, I decline to dismiss the petition based on my finding that Adkins is not a statutory supervisor.

The Employer operates a skilled nursing facility with two units, the Keolamau and Wailani units, each of which has about twenty residents. The Wailani unit has more acute care residents and the Keolamau has more long-term care residents.

Adkins works in the Employer's nursing department under the director of nursing. She is a certified nursing assistant (CNA), a classification covered in the unit certified by the Board in Case 37-RC-3964. She works on the evening shift three days a week, from 2 pm to 10 pm, and on the night shift on Saturday and Sundays from 10 p.m. to 6 a.m. During the evening shift, Adkins works with about six other CNAs and two nurses. Other daytime employees, including laundry personnel, dietary personnel, the facility's director and the director of nursing, are still on duty during the first part of the evening shift. Adkins has worked on both units on the night shift, during which about three CNAs are assigned to the Wailani unit and two nurses are assigned there; about three CNAs and one nurse are assigned to the Keolamau unit. There is also a laundry aide who works at the Employer's facility until midnight.

A charge nurse is always on duty whenever Adkins works and Adkins reports to and receives directions from the charge nurse. Charge nurses assign residents to each CNA and CNAs go to the charge nurses with any problems they encounter during their shifts. Each CNA cares for about twenty residents. The job of Adkins as well as the other CNAs involves carrying out the duties specified in each patient's care plan, which involves providing assistance to the resident with eating, transferring, bathing and dressing. CNAs report their observations of the physical condition and needs of residents to nursing personnel. Adkins and the other CNAs also help to train new CNAs that are hired by the Employer by showing them how job duties are performed. In the five years that Petitioner has worked for the Employer, she has oriented two new CNAs at the direction of the charge nurse.

The record reflects that Adkins has no authority over other employees and that her work is the same as that of other CNAs at the Employer's facility, as spelled out in the CNA job description, namely, taking care of the needs of her assigned residents by assisting nursing personnel in providing nonprofessional nursing care and simple technical nursing services under the direction and supervision of a registered nurse or licensed practical nurse.

Analysis. As indicated above, the Union contends that the petition must be dismissed on the basis that Adkins is a statutory supervisor and the Employer takes the opposite position.

The term "supervisor" is defined in Section 2(11) of the Act as:

"[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *International Center for Integrative Studies*, 297 NLRB 601 (1990); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). An individual who exercises some "supervisory authority" only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id.* Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected

under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). Secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an employee is a statutory supervisor. *Laborers Local 341 v. NLRB*, *supra*; *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971); *Waterbed World*, 286 NLRB 425, 426 (1987).

Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). It is well established that mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Although a supervisor may have "potential powers . . . theoretical or paper power will not suffice. Tables of organization and job descriptions do not vest powers." *Oil Workers v. NLRB*, *supra*, at 243. In addition, the evidence must show that the alleged supervisor knew of his or her authority to exercise such power. *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 969 (4th Cir. 1980).

Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

In the instant case, I find that the evidence does not establish that Adkins is a statutory supervisor. There is no evidence that she possesses or exercises any of the powers enumerated in Section 2(11) of the Act or that she effectively recommends actions in these areas. Thus, the fact that Adkins asks other CNAs for assistance to transfer residents when she cannot do so on her own, as do other CNAs, does not make her a statutory supervisor. Likewise, the fact that the Employer has newly hired CNAs work with her, as well as with the other CNAs, to orient them to their jobs, does not make Adkins a statutory supervisor. Nor does her reporting of rule infractions by other employees to management that she believes constitute resident abuse or neglect establish her supervisory status. Indeed, as Adkins pointed out in this regard, she is legally obligated to report such abuse or neglect of residents. Further, there is no showing that her reporting in this regard has amounted to a recommendation for discipline or that the Employer has taken any disciplinary action based on her reporting of such matters. Nor do I find that the fact that on one occasion in the five years she has been employed, Adkins has recommended the hire of a CNA, who thereafter applied in the usual channels and was hired by the Employer, to be sufficient to warrant a finding that Adkins is a supervisor under the Act. Thus, there is no showing that her recommendation was actually effective in causing the hire of this individual and, in any event,

this represents a sporadic exercise of asserted supervisory authority, which standing alone is not sufficient to establish supervisory status.

Nor do I find that the fact that Adkins has “exceeded” the duties spelled out in her job description by singing to her residents a sufficient basis for finding that she is a statutory supervisor. Lastly, the fact that Adkins believes that she exercises independent judgment in caring for residents does not establish that she is a statutory supervisor, in the absence of any evidence showing that she possesses any of the indicia of supervisory authority under Section 2(11). In view of the foregoing, I find that Adkins is not a statutory supervisor and she will be included in the unit.

As I have found that Adkins is not a statutory supervisor, I decline to dismiss the petition and direct that an election be held in the same unit as certified by the Board in Case 37-RC-3964, on October 30, 2000. See Campbell’s Soup Co., 111 NLRB 234 (1955).

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